

Tentative Rulings for June 8, 2016
Departments 402, 403, 501, 502, 503

There are no tentative rulings for the following cases. The hearing will go forward on these matters. If a person is under a court order to appear, he/she must do so. Otherwise, parties should appear unless they have notified the court that they will submit the matter without an appearance. (See California Rules of Court, rule 3.1304(c).)

15CECG01543 *Koosharem, LLC v. Alexander* (Dept. 501)

The court has continued the following cases. The deadlines for opposition and reply papers will remain the same as for the original hearing date.

16CECG00949 *Bradshaw v. Acqua Concepts, Inc. et. al* is continued to Wednesday, June 15, 2016 at 3:30 p.m. in Dept. 503.

(Tentative Rulings begin at the next page)

Tentative Rulings for Department 402

(5)

Tentative Ruling

Re: ***Transport Funding, LLC v. Gurmit Singh Sandhu et al.***

Superior Court Case No. 16 CECG 00985

Hearing Date: June 8, 2016 **(Dept. 402)**

Applications: Writ of Possession

Tentative Ruling:

To deny the applications without prejudice.

Explanation:

Background

On November 24, 2014, Defendant Gurmit Singh Sandhu entered into an agreement with Arrow Truck Sales for the purchase of a 2012 Freightliner Cascadia Tractor, VIN #1FUJGLDR6CSBA3210. Sandhu was to make 60 monthly payments in the amount of \$1749.44 beginning on January 9, 2015 and continuing on the 9th day of every following month until the balance was paid. Pursuant to the agreement, Arrow maintained a security interest in the tractor. See Exhibit 1 attached to the Complaint. On the same day, Arrow assigned its interest in the tractor to Plaintiff, Transport Funding, LLC. See Exhibit 2.

On October 9, 2015, Sandhu failed to make a payment. Plaintiff elected to accelerate the balance and as a result, Plaintiff claims that **\$90,970.88** plus interest in the amount of 18% and late fees is owed. See ¶ 9 of the Complaint. As a result, on April 1, 2016, Plaintiff filed a Complaint against Sandhu and his wife, Karmjit R. Brar alleging causes of action for breach of contract and conversion, a common count and seeking the remedy of claim and delivery.

Procedural Requirements for Application of Writ of Possession

Prior to the hearing on plaintiff's application, defendant must be served with:

- A copy of the summons and complaint;
- A copy of the application and any supporting declarations; and
- A Notice of Application and Hearing. [CCP § 512.030(a)]

The Judicial Council has adopted for mandatory use a notice form (CD-110) that advises defendant of the purpose, place and date of the hearing. It also contains a required warning statement. [See CCP § 512.040]

In addition, copies of all of plaintiff's moving papers must be served on defendant at least *16 court days* before the hearing (increased by five calendar days if the papers are served by regular mail within California, and longer if regular mail service is to or from a place outside the state), unless the court shortens the minimum notice period. [See CCP § 1005(a)(2) & (b)]

If defendant has not appeared in the action, and a writ, notice, order or other paper is required to be personally served, service must be made in the same manner as service of a summons under CCP § 413.10 et seq. [CCP § 512.030(b)] Finally, the "claim and delivery" forms do not provide a space for affidavits of service. Therefore, proof of service must be *specially drafted*. The proof of service must be filed no later than five court days before the hearing. [CRC 3.1300(c)]

Applications at Bench

On April 4, 2016, the Plaintiff filed a notice of application seeking a writ of possession, the application itself, a Memorandum of Points and Authorities and a Declaration for **each** Defendant. The Plaintiff used the mandatory judicial council forms (CD-100 and CD-110) for the Notice and the Application. On April 11, 2016, the Plaintiff served the summons, complaint, notice of application, application and supporting documents on Defendant Sandhu via substituted service upon his wife, Karmjit R. Brar. Defendant Brar was personally served the same day. See Proofs of Service filed on April 19, 2016.

On May 19, 2016, Plaintiff filed an "Amended Notice of Application for writ of possession hearing." Although the date, time, and Department remained the same, the notice provided the correct address for Dept. 402 as "Fresno County Superior Court located at 1130 O Street, 4th Floor, Fresno California, 93721 not 1100 Van Ness, Fresno, California 93724 as previously noticed." See Amended Notice. The Amended Notice was necessary because the Notice of Application and Application for the writ of possession listed the address of the court as 1100 Van Ness Avenue.

The Amended Notice was served via U.S. Mail on Glen Earl Gates, Esq. However, service must be made on a party's attorney **only** when the party has appeared by an attorney. See CCP § 1015. Here, the Defendants have not filed an Answer or other responsive pleading. In addition, service of the amended notice did not provide the requisite 16 court days' notice. See CCP §§ 1005(a)(2) and 1005(b). Therefore, service of the amended notice is invalid. The applications will be denied without prejudice.

Issued By: JYH on 6/7/2016.
(Judge's initials) (Date)

(6)

Tentative Ruling

Re: ***Consolidated Irrigation District v. City of Reedley***
Superior Court Case No.: 15CECG01695

Hearing Date: June 8, 2016 (**Dept. 402**)

Motions: (1) By Petitioner Consolidated Irrigation District for relief from court's April 11, 2016 order;

(2) By Petitioner Consolidated Irrigation District for change of venue to Neutral County or assignment of a disinterested judge from a neutral county

Tentative Ruling:

To deny the motion for relief from the court's April 11, 2016, order, and to grant the motion for change of venue to a neutral county, transferring this action to Merced County.

Explanation:

Motion for relief of court's April 11, 2016, order, pursuant to Code of Civil Procedure section 473

Although this motion could have been brought before Judge Cardoza pursuant to Code of Civil Procedure section 1008, it is equally proper to bring it pursuant to Code of Civil Procedure section 473 for relief from the dismissal.

Here, the mistake which allegedly led to the April 11, 2016, dismissal order, was attorney P. Scott Browne's mistaken understanding that there was an actual agreement to continue a hold on these proceedings while the other case pending between the parties (*Consolidated Irrigation District v. City of Reedley*, case no. 14CECG00877 "the other case") moved forward toward the hearing on the merits, caused by Mr. Browne's post-operative cognitive disorder stemming from his August 2015 heart attack and quintuple bypass surgery.

On August 19, 2015, Mr. Browne suffered a heart attack and had a quintuple bypass operation. He was in the hospital a total of seven days. "At the time of release, I was ordered by my doctor not to return to work for at least 3 months and he recommended that I limit the work and particularly stressful work for another 3 months after that." Mr. Browne didn't do any legal work for the first month of recovery other than to direct his "of counsel," Marsha Burch, how to deal with pending clients. Mr. Browne is a sole practitioner with an active litigation and public agency practice and fortunately most of his clients, opposing counsel, and the courts were understanding

and granted ample extensions to give him an opportunity to recover. (Decl. of P. Scott Browne, ¶¶5-7.)

Beginning in late September through mid-October, Mr. Browne worked from home on the two cases because Respondent City of Reedley ("Respondent") was insistent that the parties get back to work on the settlement negotiations. It wasn't until mid-October that Mr. Browne came back to the office and then only on a limited basis. He had to fit work in between various medical appointments and cardiac rehabilitations three times per week. Cardiac rehabilitation continued through the end of 2015. Mr. Browne's stamina was low, and his ability to concentrate seemed to be affected as well. (Decl. of P. Scott Browne, ¶¶8-9.)

According to Mr. Browne, Respondents' counsel was understanding but insisted they move forward with settlement discussions. Even though the formal stay terminated on September 21, 2015, the parties once again informally agreed that the stays would remain in effect for both cases. This would allow settlement discussions to continue, give Mr. Browne more time to recover, and allow Respondents time to determine what was going to happen with the project. Global settlement discussions were unsuccessful and in late October Respondents demanded Petitioner move forward with the other case. Not a word was said about this case. (Decl. of P. Scott Browne, ¶¶10-11.)

As soon as settlement negotiations broke down, Respondent was immediately demanding that Petitioner complete the record of proceedings in the other case so it could proceed to trial. However, concerning this case, no such demand was made, even though the short statutory period for completion of the record was similar. At Respondent's request, Mr. Browne then focused the limited amount of time he had in the office each day to the preparation of the record of proceedings in the other case. Respondent's silence on this case was consistent with its prior representations that Respondent was uncertain whether they intended to defend that case and they wanted Petitioner to do no further work on the case to minimize its fees. Given these facts, Petitioner reasonably believed that the stay as to this case remained in effect and relied on that understanding in not filing a request for hearing or change of venue motion. (Decl. of P. Scott Browne, ¶12.)

In late October, Mr. Browne had several phone conversations with opposing counsel for Respondents, Shannon Chaffin, regarding motions Respondent intended to file in the other case to force completion of the record and a decision on e-mails claimed to be privileged. Mr. Chaffin indicated he intended to obtain an early December date and Mr. Browne asked Mr. Chaffin to put these off into late December to give him adequate time to recover because he was only two months out from the surgery and navigating the slow and difficult recovery from cardiac surgery, that his physician had told Mr. Browne would take approximately six months. Responding to major motions and hearing and preparing the administrative record at the same time would be difficult. Mr. Chaffin refused to alter the schedule and filed the motions. Mr. Browne did the best he could to respond to them. It did not occur to Mr. Browne during that time there were any misunderstandings with Mr. Chaffin concerning this case being on hold. (Decl. of P. Scott Browne, ¶¶13-14.)

Concerning this case, Mr. Browne says the parties' initial discussions had never been of settlement per se; rather, Respondent indicated it would likely simply rescind the approvals and wanted Petitioner to minimize its work and fees to minimize the potential award that would result from such rescission. Consequently, when global settlement discussions terminated, it wasn't an obvious indication to Mr. Browne that Respondent's intentions concerning this case had changed. In fact, Mr. Chaffin has continued, even after the April 11th order dismissing the CEQA claims, to indicate that Respondent may rescind the approvals. (Decl. of P. Scott Browne, ¶15.)

Mr. Browne says that Petitioner's first indication that Mr. Chaffin had changed his mind was the filing of Respondents' motion to dismiss on January 27, 2016. Respondent made no attempt to meet and confer with Petitioner prior to filing the motion and after receiving it, Petitioner immediately filed a request for a hearing on February 2, and filed a motion for change of venue on February 16th. Mr. Browne points out the petition itself asked for a change of venue under Code of Civil Procedure section 394 but says the motion was shelved once the parties agreed to stay all of their litigation. Given that the case was likely to be moved, Petitioner reasonably believed it made no sense to request a hearing until after venue was changed. Then the stay occurred and all work was suspended by Petitioner as requested by Respondent. (Decl. of P. Scott Browne, ¶¶17-19.)

Petitioner says that Judge Cardoza's order dismissing the CEQA causes of action makes no mention of Mr. Browne's bypass surgery. The declaration of Mr. Chaffin in opposition to the change of venue motion is also devoid of any mention of Mr. Browne's heart surgery, his period of hospitalization, and months of recovery thereafter. In fact, Mr. Browne's ability to respond to the day-to-day deadlines during the time between his heart attack in late August and the end of 2015 was significantly impaired. Such a physical impairment is precisely the type of excusable neglect that Code of Civil Procedure section 473 is designed to address, says Petitioner. (*Schmitt v. Joe Morton Lumber Co.* (1969) 137 Cal.App.2d 403, 404.)

Respondents say that Mr. Browne's mistake was not excusable. The inquiry is whether a reasonably prudent person under the same or similar circumstances might have made the same error. However, conduct falling below the professional standard of care is not excusable. (*Comunidad En Accion v. L.A. City Council* (2013) 219 Cal.App.4th 1116, 1132.) Mr. Browne is a sophisticated attorney having been admitted in California for almost 40 years. He has extensive experience representing petitioners in CEQA matters including at least seven cases in the last eight years in Fresno County alone. He knew, or should have known as a practitioner, that 21 days had already passed before the court-approved written stipulation had already expired, leaving 69 days to meet the mandatory filing requirements of Public Resources Code section 21167.4. Under these circumstances, even a new attorney would be reasonably expected to confirm in writing any alleged "understanding" with an opposing party that would affected the remaining 69 days, and also make sure that all parties so stipulated. Respondents point out that Petitioner has failed to provide any documentation showing that Respondents, let along the three Real Parties in Interest in this case, agreed to such an "understanding." Failing to confirm a stipulation under such circumstances falls below the professional standard of care and is not excusable

neglect. Essentially arguing “the other side should have told me” when Petitioner elected to prepare the record and Respondents had no legal obligation to “demand” Petitioner diligently complete its obligations, is also not excusable neglect.

Respondents say that Mr. Browne's new emphasis on his medical condition provides no excuse for the neglect of co-counsel Marsha Burch, who has been his co-counsel from the start of the litigation.

Petitioner fails to provide any e-mail, correspondence, text, phone message transcript, stipulation, court order, or other writing in support of its “understanding” that the litigation was indefinitely stayed. At most, Respondents and Petitioner had an informal “hold” on the preparation of the record of proceedings, for the duration of pending settlement discussions, which expired when settlement discussions collapsed around October 15, 2015, approximately 104 days before the motion to dismiss was brought, and approximately 125 days (excluding the stay and the informal “hold”) since the petition was filed. This is entirely consistent with both Mr. Chaffin's recollection as well as his practice to confirm all stipulations in writing by e-mail or correspondence and comply with the procedural process of having a stay of any significant duration formally signed by all the parties and approved by the court. Mr. Chaffin points out that the stay order tolled all deadlines and limitations, including preparation of the administrative record and index, and the stipulation was signed by all parties including all three Real Parties in Interest before being submitted to the court for approval.

Petitioner's reply emphasizes Mr. Browne's illness last year, saying that not only did it reduce his stamina and limit his work capacity, it is commonly referred to as post-operative cognitive disorder, and causes a “transient decline in attention and concentration, memory, and/or speed of mental processing.” It was at first thought to last only weeks, but more recent work has shown that it can have a long-term effect, citing to a “scholarly article” attached to the reply declaration of Marsha Burch.

Upon receipt of the April 11, 2016 order dismissing the CEQA causes of action, Mr. Browne asked Ms. Burch to review the order and underlying papers, and it was immediately apparent to Ms. Burch that while Mr. Browne was reluctant to emphasize his illness, he had raised it, and the parties and Judge Cardoza had completely ignored the issue. For someone who has just gone through the trauma of a heart attack and cardiac surgery, the magnitude of the experience may seem obvious. In this case, for some reason, the issue did not register with Judge Cardoza or Respondents' counsel, and so Ms. Burch asked Mr. Browne a series of day-to-day questions regarding his reality of attempting to return to the office while still recovering. Those facts are included in this motion. Mr. Browne says it took someone not caught up in the disability to recognize it and bring it properly to the attention of the court by this motion.

Mr. Browne says that Ms. Burch is not an associate in his office, but is “of counsel” to him and provides contract services to him on a project-by-project basis.

In order for a mistake to relieve someone from a default or a dismissal equivalent to a default, the inquiry is whether a reasonably prudent person under the same or

similar circumstances might have made the same error. (*Comunidad En Accion v. L.A. City Council*, *supra*, 219 Cal.App.4th 1116, 1132.)

This is not a situation as it was in *Schmitt v. Joe Morton Lumber Co.*, where an attorney at the time papers were dropped off in the attorney's office while he was absent from his office upon the advice of a physician and who, upon return to the office shortly thereafter, inadvertently let the time for pleading lapse due to his poor health and the pressure of other business. (*Schmitt v. Joe Morton Lumber Co.*, *supra*, 137 Cal.App.2d 403, 404.)

Here, Mr. Browne disobeyed his doctor's express orders, and returned to work approximately six weeks after his discharge from the hospital, when he admits he was told by his doctor to completely stop working for three months. He admits at the time he was aware his stamina was low and his ability to concentrate was affected.

Mr. Browne admits that as a sole practitioner with an active litigation and public agency practice (§17), he could only work two to four hours a day at that time. He had to fit work in between various medical appointments and cardiac rehabilitation three times per week. Cardiac rehabilitation continued through the end of 2015. Mr. Browne admits that responding to major motions and hearings and preparing the record at the same time in the other case would be difficult and admits that Mr. Chaffin filed motions in November of 2015 for hearing on December 4, 2015 in the other case. (Decl. of P. Scott Browne, ¶13.) Mr. Browne says he did the best he could to respond to the Respondents' motions in the other case which were his primary focus of his limited capabilities during November 2015 through January of 2016. (Decl. of P. Scott Browne, ¶13.) Yet he admits that by the end of September, Mr. Chaffin was pressuring him to resume global settlement negotiations.

Nor is this a simple calendaring error such as was the case in *Comunidad En Accion v. Los Angeles City Council*, *supra*, 219 Cal.App.4th 1116, 1134-1135.

Attorneys must not accept representation unless they can dedicate adequate time and resources to pursue the matter with reasonable diligence: "An attorney owes an obligation not only to his client but also to the courts and the justice system not to undertake legal representation in matters unless he has adequate time to pursue the matter with reasonable diligence." (*Lopez v. Larson* (1979) 91 Cal.App.3d 383, 400; see also ABA Model Rule 1.3, Comment (4)). Diligence includes best efforts to accomplish with reasonable speed the purpose for which the attorney was employed. (*Van Sloten v. State Bar* (1989) 48 Cal.3d 921, 931; *Calvert v. State Bar* (1991) 54 Cal.3d 765, 785; see also ABA Model Rule 3.2.) Mr. Browne does not explain why he didn't ask Ms. Burch to do more of the work, why he didn't hire additional staff, or why he didn't resign from the representation.

The Court notes that no declaration from Mr. Browne's physician or any other medical expert has been submitted which would explain what, if any, cognitive dysfunction Mr. Browne has suffered, or apparently still suffers. Ms. Burch, an attorney, not a physician, has attached a "scholarly article" indicating that many persons who suffered from Mr. Browne's illness may suffer from post-operative cognitive dysfunction,

and implies that he was still suffering from such ill effects as recently as April of this year, but this is no substitute for admissible evidence of Mr. Browne's condition.

Further, the Court notes that the August 5, 2015, stay in this case was entered into by stipulation signed not only by Petitioner and Respondents, but by Real Parties In Interest as well. Further, at ¶6 of the stay, it states: "It is the intention of the Parties that should settlement not be reached, the litigation will resume with no party suffering any prejudice to their legal rights as a result of the stay." (August 8, 2015, stay order.) Clearly then, Petitioner had agreed upon and was on notice that as soon as the stay expired on September 21, 2015, that the litigation would resume again. It also would not have been reasonable that a stay would be in place if the three Real Parties In Interest did not agree with a further stay, as they had originally signed onto the stay previously. Further, Mr. Browne admits that Mr. Chaffin was insistent in late September through mid-October that the parties "get back to work" on the global settlement negotiations. These facts do not make Mr. Browne's assumption that the stay would remain in effect reasonable.

The motion for relief from the April 10, 2016, order, is denied.

Motion for change of venue

Code of Civil Procedure section 394, authorizing removal to a neutral county where a city or county is a party, is a removal or change of venue statute. In *Adams v. Superior Court* (1964) 226 Cal.App.2d 365, 367, the court noted that the statute does not prescribe any time for the motion, thus, it must be made within a reasonable time. This depends on the circumstances, and it need not, like an ordinary motion, be made at the time to plead. Because there the motion was made before trial of any issue of law or fact, the time was reasonable. However, because defendants demurred at the same time they moved to change venue, the Riverside court was permitted to rule on the demurrers, and if the court would sustain them without leave to amend and enter judgment for the defendants, no transfer would be made. (*Id.* at p. 369.)

Here, the case almost immediately went into a standstill by written court order, on August 5, 2015. Even though the stay expired on its own terms on September 21, 2015, nothing else has occurred in this case until Respondents successfully moved to dismiss the CEQA causes of action in March of 2016. In fact, the court's docket indicates that Petitioner had set a hearing on a motion to change venue for August 21, 2015, and it was taken off calendar, no doubt because of the recently-entered stay.

Petitioner has not waived its right to transfer this case to a neutral county. (*Newman v. County of Sonoma* (1961) 56 Cal.2d 625, 627-628.) Consequently, the motion is granted, and the case transferred to Merced County.

Tentative Ruling

(Judge's initials) (Date)

(28)

Tentative Ruling

Re: ***Monifi v. Mitroo, et al.***

Case No. 13CECG03806

Hearing Date: June 8, 2016 (Dept. 402)

Motion: By Plaintiff for Relief from Voluntary Dismissal of Proceedings

Tentative Ruling:

To grant the motion for relief. The Court orders the dismissal entered February 18, 2016 set aside in its entirety.

The Court also sets a trial setting conference for June 29, 2016, at 3:30 p.m. in Department 402. Parties should also be prepared to discuss setting a date for defendant's motion for summary judgment.

Explanation:

[The Court notes that as of the date of this tentative ruling no reply brief appears in the Court's files for this motion.]

Plaintiff Anees Monifi filed a complaint against defendants for medical malpractice against defendants Prandya Mitroo, Siew-Ming Lee, and Clovis Community Hospital.

On February 16, 2016, Plaintiff agreed to dismiss defendant Clovis Community Hospital from the action.

On February 17, 2016, Plaintiff's attorney signed a dismissal that was apparently provided by counsel from Clovis Community Hospital. The form dismissed the entire case with prejudice.

Plaintiff moved to set aside the dismissal under CCP §473, but this Court ruled that mandatory relief does not extend to voluntary dismissals and that Plaintiff had not established entitlement to discretionary relief in a minute order dated April 26, 2016. The Court's ruling suggested that Plaintiff could move to set aside the dismissal under CCP section 473, subdivision (d) on the grounds that the client had not agreed to the dismissal.

On May 17, 2016, Plaintiff filed the present motion to set aside the dismissal on the grounds that Plaintiff herself had not agreed to the dismissal. (*Citing Romadka v. Hoge* (1991) 232 Cal.App.3d 1231, 1235.) "It follows that dismissal of a cause of action by an attorney acting without any authority from his client is an act beyond the scope of his authority which, on proper proof, may be vacated at any time. Obviously, such action requires strong and convincing proof, and the longer the delay in the application for relief the stronger and more convincing the factual proof should be." (*Whittier Union High Sch. Dist. v. Superior Court* (1977) 66 Cal.App.3d 504, 509.)

Here, Plaintiff has provided the declarations of the client and of counsel to the effect that the dismissal of the entire action was not authorized. The initial motion was filed within six weeks of the dismissal. Under such circumstances, Plaintiff has carried her burden to show entitlement to setting aside the dismissal.

Defendant does not challenge the propriety of the motion as such but seeks their attorney fees pursuant to Code of Civil Procedure §473, subdivision (b). However, Plaintiff's motion was made pursuant to subdivision (d), which allows the Court to set aside void judgments; there is no provision in that subdivision for the recovery of attorney's fees. Therefore, the Court will not award attorney's fees for Defendant.

Defendant also seeks a conference to discuss setting a date for trial and for Defendant's motion for summary judgment. The Court therefore sets trial setting conference for June 29, 2016 at 3:30 p.m. in Department 402. The parties should be prepared to discuss trial and hearing dates at that time.

Pursuant to California Rules of Court, rule 3.1312, subdivision (a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: JYH **on** 6/7/2016.
 (Judge's initials) (Date)

(17)

Tentative Ruling

Re: ***Keen v. Kan-Di-Ki, LLC et al.***
Court Case No. 16 CECG 00955

Hearing Date: June 8, 2016 (Dept. 402)

Motion: Defendant's Motion to Compel Arbitration

Tentative Ruling:

To deny.

Explanation:

The party seeking to compel arbitration bears the burden of proving the existence of a valid arbitration agreement. (*Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 972.) "Under 'both federal and state law, the threshold question presented by a petition to compel arbitration is whether there is an agreement to arbitrate.' " (*Cruise v. Kroger Co.* (2015) 233 Cal.App.4th 390, 396 (*Cruise*), italics omitted.) Courts therefore recognize that the right to arbitration depends on a contract. Under California law, the elements of a valid contract are (1) parties capable of contracting; (2) mutual consent; (3) a lawful object; and (4) consideration. (Civ. Code § 1550.)

As with any other contract, the existence of an agreement to arbitrate requires the mutual consent of the parties to the purported agreement. (*HM DG, Inc. v. Amini* (2013) 219 Cal.App.4th 1100, 1109.) Where mutual consent is established, the general rule in California is that " ' "arbitration should be upheld unless it can be said with assurance that an arbitration clause is not susceptible to an interpretation covering the asserted dispute." ' " (*Cruise, supra*, 233 Cal.App.4th at p. 397.) Under California law, "mutual consent is gathered from the reasonable meaning of the words and acts of the parties, and not from their unexpressed intentions or understanding." (1 Witkin, Summary 10th (2005) Contracts, § 116, p. 155.) Whether the parties have mutually consented to a contract is a question of fact. (*Alexander v. Codemasters Group Limited* (2002) 104 Cal.App.4th 129, 141.)

Plaintiff contends she did not consent to arbitration because the language of the "opt-out" clause in paragraph 3 is confusing, and lead her to believe that she was opting out of arbitration altogether.

The language of paragraphs 2 and 3 is confusing, especially when read together. Although paragraph 2 states that the arbitration agreement applies to "all disputes that may arise out of or be related in any way to" the employee's employment, that "each specifically waive[s] and relinquish[s] our right to bring a claim against the other in a court of law," and both "give up our right to trial by jury of any claim [each] may have against each other," paragraph 2 still enumerates no less than

four specific claims not covered by the agreement and refers to miscellaneous "state or federal law claims" that also might not be covered. This leads to uncertainty as to what the arbitration clause covers.

More troubling is the uncertainty as to what the opt-out clause entails. Paragraph 2 states that the arbitration agreement is "equally binding on any person who represents or seeks to represent [the employee] or the Company in a lawsuit against the other in a court of law" and paragraph 3 states that all claims "brought under this binding arbitration agreement shall be brought in the individual capacity of the [sic] myself or the Company." To a layperson, unknowledgeable about the difference between "representation" and "representative claims," this would appear to conflict. Paragraph 3 then waives the right to bring "all claims or controversies [that] proceed as a class, action, collective action, private attorney general action, or any *similar representative action*." (Emphasis added.) Even if a layperson understands what a class action is, it is unlikely that a lay person will know what a representative action is, much less a collective action, or private attorney general action, as these terms are not defined. Finally, paragraph 3 allows the employee to opt-out of the right to bring "an action on a class, collective, private attorney general, representative or other similar basis," which plaintiff did. However, because paragraph 2 includes all representatives in the arbitration agreement, it is conceivable that a layperson could misunderstand the "representative or other similar basis" opt-out language to include all claims.

Normally, ambiguities in a written contract are to be construed against the party who drafted it. (*Victoria v. Superior Court* (1985) 40 Cal.3d 734, 745.) "In cases of uncertainty ... the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist." (Civ. Code, § 1654.)

Here, plaintiff has introduced evidence to support her interpretation of the agreement which supports her contention she did not agree to arbitrate her claims. Specifically, she called her office manager to confirm she was not agreeing to arbitration. Defendant objects to the introduction of this evidence as irrelevant and hearsay. It is not irrelevant, nor barred by the parole evidence rule as it is not being offered to contradict the terms of the agreement, but rather to demonstrate plaintiff's lack of consent. (1 Witkin, *supra*, § 116, p. 155.) Nor is it hearsay. (c.f. *People v. Waidla* (2000) 22 Cal.4th 690, 723 [victim's statement that she was afraid of defendants relevant to lack of consent and therefore not hearsay under state of mind exception].)

Defendant is correct that cases holding that failure to read and understand a contract are many, citing *Brookwood v. Bank of America* (1996) 45 Cal.App.4th 1667, *Marin Storage & Trucking v. Benco Contractor & Engineering* (2001) 89 Cal.App.4th 1042, and *Hernandez v. Badger Construction Equipment Co.* (1994) 28 Cal.App.4th 1791, *Stewart v. Preston Pipeline, Inc.* (2005) 134 Cal.App.4th 1565, fn. 30. However, in these cases the courts found the language of each contract expressly or impliedly clear and unambiguous. (*Brookwood*, *supra*, 45 Cal.App.4th at pp. 1673-1674; *Marin Storage & Trucking*, *supra*, 89 Cal.App.4th at pp. 1049-1050, *Hernandez*, *supra*, 28 Cal.App.4th at pp. 1815-1816.)

Moreover, in *Brookwood*, *supra*, 45 Cal.App.4th 1667, and *Stewart*, *supra*, 134 Cal.App.4th 1565 the appellate courts discussed the doctrine of unilateral mistake as contractual defense. Again, arbitration may be refused where grounds exist for revocation of the agreement to arbitrate. (9 U.S.C. § 2 ["grounds as exist at law or in equity for the revocation of any contract"]; Code Civ. Proc., § 1281 ["grounds as exist for revocation of any contract"].) However, "revocation of a contract" is a misnomer under California law, contracts are extinguished by "rescission." (Civ. Code, § 1688 et seq.) The grounds for rescission under California law include mistake. (See Civ. Code, § 1689.)

A subjective misinterpretation of a contract is a mistake of law. (*Hedging Concepts, Inc. v. First Alliance Mortgage Co.* (1996) 41 Cal.App.4th 1410, 1421 & fn. 9 [mistake of law exists "when a person knows the facts as they really are, but has a mistaken belief as to the legal consequences of those facts"].) A unilateral mistake, whether of fact or law, supports rescission only when it " 'is known to the other contracting party and is encouraged or fostered by that party.' [Citation.]" (*Brookwood*, *supra*, 45 Cal.App.4th at pp. 1673–1674.) Parties dealing at arm's length have no duty to explain to each other the express and plain terms of a written contract. (*Ibid.*) Reliance on a unilateral mistake "is not reasonable when [a party] could have ascertained the truth through the exercise of reasonable diligence. [Citation.]" (*Ibid.*)

In *Stewart*, *supra*, 134 Cal.App.4th 1565, the plaintiff sought to rescind a settlement agreement he signed based on a unilateral mistake of fact because he did not read or understand the document and all of its terms. (*Id.* at pp. 1586–1587.) The *Stewart* court rejected his challenge because the plaintiff caused the mistake by neglecting a legal duty. (*Id.* at pp. 1588–1589.) The court explained, "Plaintiff has cited no California cases (and we are aware of none) that stand for the extreme proposition that a party who fails to read a contract but nonetheless objectively manifests his assent by signing it—absent fraud or knowledge by the other contracting party of the alleged mistake—may later rescind the agreement on the basis that he did not agree to its terms." (*Id.* at p. 1589.)

Because plaintiff called her office manager to confirm her understanding that she had opted out of arbitration altogether, and defendant did nothing to correct plaintiff's misunderstanding, it can be said that the mistake was known to defendant and encouraged or fostered by defendant. Additionally, the arbitration clause was sufficiently confusing, and the time given to plaintiff, a layperson, to review the document sufficiently short, that her misunderstanding was reasonable.

Plaintiff's declaration does not violate the parol evidence rule. The parol evidence rule does not exclude evidence of mistake, the validity of an agreement, or of other evidence of the circumstances under which the agreement was made. (Code Civ. Proc. § 1856, subd (f), (g).) Defendant's authority is not to the contrary. "[W]here the terms of an agreement are set forth in writing, and the words are not equivocal or ambiguous, the writing or writings will constitute the contract of the parties, and one party is not permitted to escape from its obligations by showing that he [or she] did not intend to do what his [or her] words bound him [or her] to do." (*Brant v. California Dairies, Inc.* (1935) 4 Cal.2d 128, 134, emphasis added.) Here the arbitration agreement

is ambiguous. "Parol evidence is not admitted to show that the appellants 'meant something other *than* what they said but by showing what they meant *by* what they said.' " (*Larsen v. Johannes* (1970) 7 Cal.App.3d 491, 500.)

The arbitration agreement is admissible. Although plaintiff objects to the admission of the arbitration agreement, she authenticates the document in her declaration by stating "I recall receiving this agreement from my supervisor, Scott Spurgeon on or about June 23, 2014."

The arbitration agreement was not required to be signed by defendant. Arbitration agreements in the employment context are regularly enforced although never signed by the employer. All that need be shown is that the employer intended to be bound by the arbitration clause in its employment handbook. (*Cruise, supra*, 233 Cal.App.4th at pp. 397-99.) This standard is easily established here. The arbitration provisions refers to the employee and "the Company." The agreement is marked "DL Employee Handbook June 2014," was distributed to defendant's employees and found in plaintiff's employment file.

Pursuant to California Rules of Court, rule 3.1312(a) and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: JYH **on** 6/7/2016 .
 (Judge's initials) (Date)

Tentative Rulings for Department 403

03

Tentative Ruling

Re: **Rogers v. Vestal**
Case No. 14 CE CG 02861

Hearing Date: June 8th, 2016 (Dept. 403)

Motion: Defendants' Motion to Compel Plaintiff's Physical Examination, and Request for Monetary Sanctions

Tentative Ruling:

To deny the defendants' motion to compel plaintiff's physical examination and request for monetary sanctions. (Code Civ. Proc. § 2032.250.) To deny plaintiff's request for monetary sanctions against defendants.

Please note – on the event oral argument is requested it will be held on Thursday, June 9th at 3:00 in Dept. 403.

Explanation:

First of all, defendants have moved to compel plaintiff's medical examination under the wrong code section. They move under Code of Civil Procedure section 2032.310. However, section 2032.310 relates to cases where the defendant is not entitled to a medical examination of the plaintiff as a matter of right, or where the defendant seeks a mental examination of the plaintiff. In such cases, the defendants must seek a court order before obtaining an examination of the plaintiff. (Code Civ. Proc. § 2032.310.)

Here, plaintiff has alleged a personal injury claim, so the defendants are entitled to a medical examination of plaintiff without first seeking a court order. They simply need to serve a demand for an examination. (Code of Civ. Proc. § 2032.220, subd.'s (a), (b).) The plaintiff is then required to respond to the demand in writing, with a statement that she "will comply with the demand as stated, will comply with the demand as specifically modified by the plaintiff, or will refuse, for reasons specified in the response, to submit to the demanded physical examination." (Code Civ. Proc. § 2032.230, subd. (a).) The plaintiff must serve her written response to the demand within 20 days of service of the demand. (Code Civ. Proc., § 2032.230, subd. (b).)

"If a plaintiff to whom a demand for a physical examination under this article is directed fails to serve a timely response to it, that plaintiff waives any objection to the demand." (Code Civ. Proc. § 2032.240, subd. (a).) Also, if the plaintiff fails to respond to the demand, "The defendant may move for an order compelling response and

compliance with a demand for a physical examination.” (Code Civ. Proc., § 2032.240, subd. (b).) No meet and confer effort is required before the defendant may move to compel a response. (*Ibid.*) The defendant may also seek monetary sanctions if he or she has to move to compel the plaintiff to respond to the demand, and the court shall grant sanctions “unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust.” (Code Civ. Proc., § 2032.240, subd. (c).)

On the other hand, if plaintiff does serve a written response to the demand but refuses to appear for the examination, or imposes conditions that are not acceptable to defendant, defendant has the right to move for an order compelling plaintiff to appear for the examination pursuant to the demand. (Code Civ. Proc. § 2032.250, subd. (a).) In order to seek an order compelling plaintiff to appear for her examination, the defendant must show a good faith effort to meet and confer. (*Ibid.*) The defendant may also move for sanctions against the plaintiff for refusing to appear for the examination. (Code Civ. Proc. § 2032.250, subd. (b).)

Here, defendants served a demand for a physical examination on plaintiff on January 6th, 2016, setting the examination with Dr. Kurt Miller on April 13th, 2016. (Ross decl., ¶ 2, and Exhibit A thereto.) Defendants complain that plaintiff never appeared for the examination as scheduled. However, defense counsel does not state whether plaintiff served a written response to the demand. Nor is it clear whether plaintiff raised any objections to the demand.

Therefore, the court cannot grant a motion to compel plaintiff to appear for her examination, since the court can only grant such an order if plaintiff served a written response to the demand and then failed to attend the examination. Also, since defense counsel has not presented any evidence of a meet and confer effort regarding the non-appearance, the motion to compel is procedurally defective. Nor can the court treat the motion as a motion to compel plaintiff to serve a written response to the demand, since there is no evidence that plaintiff failed to serve a response. As a result, the court intends to deny the motion to compel plaintiff's attendance at the deposition.

In addition, the court intends to deny defendants' request for monetary sanctions against plaintiff, as defendants failed to prevail on their motion. Nor can the court grant sanctions in favor of plaintiff, since plaintiff's counsel has not provided any evidence of the amount of time he spent to oppose the motion, and indeed he does not even state what amount of sanctions he seeks. Therefore, both parties' requests for monetary sanctions will be denied.

Pursuant to CRC 3.1312 and CCP §1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: KCK **on** 6/6/16.
(Judge's initials) (Date)

(23)

Tentative Ruling

Re: **David White v. Target Corporation**
Superior Court Case No. 15CECG01252

Hearing Date: Wednesday, June 8, 2016 (**Dept. 403**)

Motion: Defendant Target Corporation's Motion to Compel Responses to Form Interrogatories, Special Interrogatories, and Requests for Production of Documents, and Request for Monetary Sanctions

Tentative Ruling:

To grant Defendant Target Corporation's motion to compel responses to Form Interrogatories, Special Interrogatories, and Requests for Production of Documents. (Code Civ. Proc., §§ 2030.290, subd. (b) & 2031.300, subd. (b).) Plaintiff David White is ordered to serve verified initial responses, without objection, to Form Interrogatories, Set One, Special Interrogatories, Set One, and Requests for Production of Documents, Set One, within 10 days after service of the minute order.

To grant Defendant Target Corporation's request for monetary sanctions in the total amount of \$410.00 against Plaintiff David White and in favor of Defendant Target Corporation. (Code Civ. Proc., §§ 2030.290, subd. (c) & 2031.300, subd. (c).) Sanctions are due and payable to Defendant Target Corporation's counsel within 30 days after service of the minute order.

Please note – on the event oral argument is requested it will be held on Thursday, June 9th at 3:00 in Dept. 403.

Explanation:

On February 19, 2016, Defendant Target Corporation ("Defendant") mail-served Plaintiff David White ("Plaintiff") with Form Interrogatories, Set One, Special Interrogatories, Set One, and Requests for Production of Documents, Set One. (Declaration of Patrick J. Osborn, ¶ 3 and Exhibits A-C.) Pursuant to Code of Civil Procedure sections 1013, subdivision (a), 2030.260, subdivision (a), and 2031.260, subdivision (a), Plaintiff had until March 25, 2016 to timely serve his verified initial responses to the discovery requests on Defendant. However, as of April 26, 2016, Defendant has not received any responses to the discovery requests. (Declaration of Patrick J. Osborn, ¶ 6.)

Consequently, the Court grants Defendant's motion to compel Plaintiff to provide verified initial responses to Form Interrogatories, Set One, Special Interrogatories, Set One, and Request for Production of Documents, Set One.

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: KCK **on** 6/6/16 .
 (Judge's initials) (Date)

Tentative Rulings for Department 501

Tentative Rulings for Department 502

03

Tentative Ruling

Re: **Cervantes v. City of Fresno**
Case No. 16 CE CG 00868

Hearing Date: June 8th, 2016 (Dept. 502)

Motion: Defendant City of Fresno and Individual Defendants' Special
Motion to Strike Under Code of Civil Procedure Section
425.16

Tentative Ruling:

To grant the special motion to strike as to all causes of action with regard to the individual defendants. (Code Civ. Proc. § 425.16.) To grant the motion to strike as to all causes of action against the City. (*Ibid.*)

Explanation:

Under Code of Civil Procedure section 425.16, "A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." (Code Civ. Proc. § 425.16(b)(1).)

"As used in this section, 'act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue' includes: (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law, (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law, (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest, or (4) any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest." (Code Civ. Proc. § 425.16(e).)

"Section 425.16, subdivision (b)(1) requires the court to engage in a two-step process. First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity. The moving defendant's burden is to demonstrate that the act or acts of which the plaintiff complains were taken 'in furtherance of the [defendant]'s right of petition or free speech under the United States or California Constitution in connection with a public issue,' as defined in the statute. [Citation.] If the court finds such a showing has been

made, it then determines whether the plaintiff has demonstrated a probability of prevailing on the claim. Under section 425.16, subdivision (b)(2), the trial court in making these determinations considers 'the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.'" (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67.)

"To establish the requisite probability of prevailing, the plaintiff must state and substantiate a legally sufficient claim. [Citation.] 'Put another way, the plaintiff "must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited.'" [Citation.]" (*Navarro v. IHOP Properties, Inc.* (2005) 134 Cal.App.4th 834, 843.)

"Only a cause of action that satisfies both prongs of the anti-SLAPP statute - i.e., that arises from protected speech or petitioning and lacks even minimal merit - is a SLAPP, subject to being stricken under the statute." (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 89.)

Here, plaintiff has conceded in his opposition that defendants' activities meet the first prong of the test under section 425.16 because they arise out of defendants' protected activities. (Opposition, p. 10, lines 12-14.) Therefore, there is no need to discuss the first prong of the test.

Plaintiff also concedes that the motion should be granted as to most of the causes of action against the individual defendants, including all of the FEHA-based claims and the malicious prosecution claim. (Opposition, p. 16, lines 14-25.) Therefore, the court intends to grant the motion to strike as to these claims against the individual defendants.

Plaintiff does not specifically concede that his defamation claim should be dismissed as to the individuals, but he offers no evidence or argument to meet his burden of showing that he has any probability of prevailing on his defamation claim. Nor does it appear that he has any likelihood of prevailing on the defamation claim as to the individual defendants, since he never alleges any specific statements or communications that could be considered defamatory and that are not covered by either government employee immunity under Government Code section 821.6 or litigation privilege under Civil Code section 47, subdivision (b).

"A public employee is not liable for injury caused by his instituting or prosecuting any judicial or administrative proceeding within the scope of his employment, even if he acts maliciously and without probable cause." (Gov. Code, § 821.6.) "'California courts construe section 821.6 broadly in furtherance of its purpose to protect public employees in the performance of their prosecutorial duties from the threat of harassment through civil suits.' [¶] Investigations are considered to be part of judicial and administrative proceedings for purposes of section 821.6 immunity." (*Richardson-Tunnell v. School Ins. Program for Employees* (2007) 157 Cal.App.4th 1056, 1062, internal citations omitted.) Conduct and statements made during or in preparation for an

internal affairs investigation are covered by the immunity of section 821.6. (*Kemmer v. County of Fresno* (1988) 200 Cal.App.3d 1426, 1437.)

Here, plaintiff's allegations against the individual defendants all appear to relate to their participation in either the criminal investigation or the subsequent Internal Affairs investigation. Therefore, all of the allegedly defamatory statements would fall within the immunity of section 821.6, and plaintiff cannot state a valid claim against the individual defendants based on such statements.

Furthermore, any statements made during judicial or other official proceedings would fall under Civil Code section 47, subdivision (b), which makes such statements absolutely privileged. "While courts have argued about the scope of the privilege, it is clear that 'the privilege has been applied to publications which were private communications between parties and which communications were related not only to actual but potential court actions.'" (*Carden v. Getzoff* (1987) 190 Cal.App.3d 907, 913, internal citations omitted.) The privilege also covers even false or libelous statements made in anticipation of, or during the course of, litigation. (*Cantu v. Resolution Trust Corp.* (1992) 4 Cal.App.4th 857, 886.)

Here, the only statements that plaintiff alleges that the individual defendants made here were either made in anticipation of the criminal proceeding, during the criminal proceeding, or as part of the Internal Affairs investigation. Therefore, the statements were all absolutely privileged under section 47, subd. (b), and they cannot form the basis for a defamation claim. As a result, the court intends to strike the defamation claim as to the individual defendants.

Next, plaintiff concedes in his opposition that the motion to strike should be granted as to his claims for malicious prosecution and defamation against the City. (Opposition, p. 16, lines 18-21.) Therefore, this claim will be stricken as well.

Also, plaintiff offers no evidence or argument to support his claim for disability discrimination under FEHA against the City. (Complaint, Fifth Cause of Action.) Indeed, plaintiff's complaint does not even allege that he was disabled or unable to perform the essential functions of his job without an accommodation. He simply alleges in conclusory fashion that defendants demoted him based on his "race and/or disability", without alleging that he actually suffers from a disability. (Complaint, ¶ 40.) He also alleges that defendants failed to engage in the interactive process with him regarding his actual or perceived disability. (*Id.* at ¶ 42.) However, he never alleges that he suffered from any disability, or that he reported his disability to his employer and requested an accommodation. Therefore, since plaintiff has not alleged that he suffered any disability that affected his ability to do his job, his claim for disability discrimination fails to state a valid cause of action.

Nor does plaintiff make any attempt in his opposition to provide any argument or evidence that would tend to show that he could state a valid claim for disability discrimination if given a chance to amend the complaint. In fact, his opposition does not discuss the issue of disability discrimination at all, nor does his declaration allege

that he suffers from a disability, or that defendant failed to accommodate him. Therefore, the court intends to strike the fifth cause of action for disability discrimination.

Next, the first through fourth causes of action in the complaint allege FEHA claims for discrimination and retaliation against plaintiff based on his national origin, Hispanic. However, plaintiff cannot state a claim under FEHA based on the criminal prosecution or Internal Affairs investigation because the City's conduct with regard to the investigations was all subject to immunity under Government Code section 821.6. Section 821.6 immunity applies not only to public employees, but also to the public entity employer as well. (*Kemmer v. County of Fresno*, *supra*, 200 Cal.App.3d at 1437.) Also, section 821.6 applies to internal disciplinary investigations of employees, including police officers. (*Ibid.*)

In addition, defendants allege that the criminal prosecution was run by the California Highway Patrol and the District Attorney's Office, not the City. Plaintiff does not dispute this allegation, so it does not appear that there is any evidence to support his claim that the prosecution was discriminatory or retaliatory. In any event, any participation by police department employees in the criminal case would be privileged under Civil Code section 47, subdivision (b). Thus, there is no way that plaintiff can state a valid claim against the City based on the criminal prosecution or the subsequent Internal Affairs investigation.

The only remaining allegations that might form a valid basis for the FEHA claims are the allegations that defendants demoted plaintiff to patrol duty and refused to reinstate him in the MAGEC tactical team after he was acquitted of the charges against him. (Complaint, ¶¶ 15, 16, 24, 31, 37.) Defendants contend that plaintiff's reassignment to patrol duty from the MAGEC team was not an adverse employment action because he lost no pay or benefits, and his subjective personal humiliation or loss of perceived status is not enough to show that he suffered an adverse employment action. (*McRae v. Department of Corrections and Rehabilitation* (2006) 142 Cal.App.4th 377, 393.)

The plaintiff alleging discrimination or retaliation "must show, among other elements, that [he] suffered an adverse employment action. Adverse employment actions include a broad array of actions such as 'hiring, firing, failing to promote, reassignment with significantly different responsibilities, or some other action causing a significant change in benefits.' To be actionable, an employment action must be 'more disruptive than a mere inconvenience or an alteration of job responsibilities.'" (*McKenzie v. Milwaukee County* (7th Cir. 2004) 381 F.3d 619, 625, internal citations omitted.)

"A transfer can be an adverse employment action when it results in substantial and tangible harm. A transfer is not an adverse employment action when it is into a comparable position that does not result in substantial and tangible harm. A transfer is not an adverse action simply because the plaintiff finds it to be 'personally humiliating.'" (*McRae v. Department of Corrections and Rehabilitation*, *supra*, 142 Cal.App.4th at 393, some internal citations omitted.)

Here, defendants contend that the plaintiff's reassignment to patrol was not a demotion, since he retained the job title of sergeant and did not lose pay or benefits. However, plaintiff contends that he lost not only prestige and status within the Department, but also substantial additional pay, overtime pay, flexible hours, and the use of a Fresno Police Department car for him to drive to and from work when he was transferred back to patrol. (Cervantes decl., ¶ 18.) Thus, he claims that his reassignment was a demotion, even though it was within the same job classification. (*Ibid.*)

Defendants have not offered any evidence to establish that a patrol position is no different than a position in the MAGEC unit, and that transferring plaintiff from MAGEC to patrol did not reduce his pay or benefits. The declaration of Chief Dyer merely states that he does not consider patrol sergeant to be a lesser assignment than other sergeant assignments, and that many sergeants have been promoted from patrol higher ranks over the years, including himself. (Dyer decl., ¶ 6.) He never states, however, that the reassignment to patrol does not result in a loss of pay or benefits, or that there is no impact on the sergeant's ability to collect overtime and other special pay.

By contrast, plaintiff alleges that he will lose the ability to collect "TAC Pay" of about \$3,400 per year, which is itself a substantial loss of pay. (Cervantes decl., ¶ 18.) He also alleges that he will not be able to collect as much overtime as he would have if he remained on MAGEC, where he accrued about 1,500 hours of overtime in three years. (*Ibid.*) His claim that he will not be able to set his own schedule and drive a Department vehicle to and from work probably does not constitute an adverse employment action. (*O'Neal v. City of Chicago* (2004) 392 F.3d 909, 913: losing flexible work schedule and the ability to have weekends and holidays off does not make a lateral job transfer an adverse employment action.) Likewise, the mere fact that plaintiff considers a patrol assignment to be a loss of prestige and "the bottom of the barrel" does not support a conclusion that the transfer was an adverse employment action. (*McRae, supra*, 142 Cal.App.4th at 393.)

However, the loss of special "Tac pay" and overtime hours would appear to support plaintiff's claim that the reassignment constituted an adverse employment action. The City argues that a speculative change in overtime hours does not equate to an adverse employment action where both positions offer opportunities to earn overtime. (*Swain v. City of Vineland* (2012) 457 Fed.Appx. 107, 111.) However, the City offers no evidence that the patrol position into which plaintiff was moved has the same types of overtime opportunities as the MAGEC position that plaintiff previously held. Therefore, the court intends to find that plaintiff has made a *prima facie* showing of an adverse employment action to support his FEHA claims.

On the other hand, plaintiff has failed to show that there was any discriminatory animus that motivated the decision to transfer him to the patrol position, or that the transfer was motivated by a desire to retaliate against him for making complaints about racial discrimination. In order to prevail on a discrimination claim, the plaintiff must show by direct or circumstantial evidence that discrimination was a substantial motivating factor in the adverse employment decision. (*Harris v. City of Santa Monica*

(2013) 56 Cal.4th 203, 232.) Here, the City has presented the declaration of Chief Dyer, the person who made the ultimate decision to transfer plaintiff to patrol. Dyer states that he rotated 15 or 20 other sergeants from one special unit to another, or from special unit to patrol, at the same time that he transferred plaintiff. (Dyer decl., ¶ 8.) He gives a number of facially legitimate reasons for transferring plaintiff from MAGEC to patrol, including that (1) he had been a sergeant in the same special unit for about three years, (2) he had limited experience as a patrol sergeant and Dyer felt it would be positive for his development, the Department, and the community to transfer him to patrol, (3) plaintiff had some issues with the use of confidential informants (CI's) and Dyer thought it would be beneficial to him to have an assignment with less involvement with CI's, and (4) moving plaintiff would allow other sergeants new opportunities. (*Id.* at ¶ 9.)

In opposition, plaintiff offers no direct or circumstantial evidence to rebut the Chief's declaration that he had legitimate reasons for the transfer. Plaintiff claims that he was taken off the MAGEC unit after he expressed opinions to the effect that the Department had permitted violations of civil rights and was not taking appropriate steps to prevent or deter such violations. (Cervantes decl., ¶ 9.) However, he does not state when he made these complaints, or to whom he made them. He only states that "Star[t]ing in 2008, and continuing to present, I have voiced my concerns and disapproval of policy changes which were discriminating as applied to me, and my superiors within the Department." (*Id.* at ¶ 10.) Yet plaintiff was not transferred to the MAGEC unit or promoted to sergeant until well after 2008, so it is not clear how there could be any causal link between the reports plaintiff allegedly made in 2008 and after and the transfer to patrol that did not occur until October of 2015. Plaintiff never states that he made any complaints directly to Chief Dyer prior to the transfer, or indeed that he made any type of formal complaint that might have been passed up the chain of command to the Chief.

Plaintiff also claims that, "Starting in 2008, and continuing to the present, I reported to my superiors within the Department that officers had prepared untruthful reports." (*Id.* at ¶ 11.) Yet these reports apparently related to plaintiff's criminal prosecution and Internal Affairs investigation, which are privileged and cannot form the basis for a discrimination or retaliation claim. Therefore, plaintiff's alleged complaints about his own criminal prosecution or IA investigation are irrelevant for the purposes of the discrimination and retaliation claims.

Plaintiff has also claimed that he was denied the chance to transfer out of patrol even though he had requested a transfer, and that he and one other Hispanic officer were the only ones who were denied such transfers out of the last 14 officers who received such "shoulder taps." (*Id.* at ¶ 12.) Thus, he claims that Hispanics are being systematically denied such transfers. (*Ibid.*) However, plaintiff points to no evidence that the officers who did receive favorable transfers were all non-Hispanics, or that Hispanics rarely receive such transfers. Also, plaintiff offers no evidence that if he had received a transfer, it would have resulted in any objective improvement in pay or benefits. He appears to merely express a preference for some other assignment based on his dislike of being assigned to patrol, which is not enough to show an adverse employment action. (*O'Neal v. City of Chicago, supra*, 392 F.3d at 913.) Thus, plaintiff

has failed to point to any direct or circumstantial evidence that would tend to show that the decision to transfer him to patrol or the refusal to give him a different assignment was the result of some discriminatory motive.

Likewise, plaintiff has not pointed to any evidence that defendants transferred him to patrol as a way to retaliate against him for making complaints about discrimination or other unlawful conduct. He alleges that he started making complaints about discrimination in 2008 and continuing to the present, but he admits that he was promoted to sergeant years after he starting making complaints, and he also received a transfer into the MAGEC unit after making complaints. Thus, it does not appear that he was punished for making the alleged complaints, since he actually received a promotion and a desirable assignment *after* he complained. Also, he never states that he made complaints to Chief Dyer or anyone else in the chain of command who might have been in a position to retaliate against him.

“Standing alone, an employee's unarticulated belief that an employer is engaging in discrimination will not suffice to establish protected conduct for the purposes of establishing a prima facie case of retaliation, where there is no evidence the employer knew that the employee's opposition was based upon a reasonable belief that the employer was engaging in discrimination.” (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1046-1047, internal citations omitted.)

Here, Chief Dyer denies being aware of any complaints made by plaintiff about discrimination, or that his decision to transfer plaintiff was motivated by discrimination. (Dyer decl., ¶ 12.) Plaintiff's own testimony in another action indicates that he did not make any formal complaint about discrimination. (Exhibit M to Defendants' Evidence, pp. 68-69.) He also stated that he “brought it to the attention of the Chief” (*id.* at p. 69), but he does not state when he complained, or what exactly he complained of. Thus, plaintiff has failed to show that Dyer or anyone else with the power to make decisions regarding his job assignments was aware of his alleged complaints before the decision to transfer him to patrol was made. If Dyer was not even aware of the alleged complaints, he could not have been motivated to retaliate against plaintiff by those complaints.

Thus, plaintiff has failed to show a causal link between his alleged complaints and the transfer to patrol, or the later decision not to give him a transfer to a different assignment. As a result, plaintiff has failed to meet his burden of showing that he has a probability of prevailing on his FEHA discrimination and retaliation claims, and the court intends to grant the City's motion to strike them.

Pursuant to CRC 3.1312 and CCP §1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: DSB on 6/6/16 .
(Judge's initials) (Date)

(20)

Tentative Ruling

Re: ***Gonzalez et al. v. Vemma Nutrition Company et al.***
Case No. 14CECG00134
Alonzo et al. v. Vemma Nutrition Company et al.
Case No. 14CECG01023
Martinez v. Vemma Nutrition Co. et al.
Case No. 14CECG01715
Smith v. Union Pacific Railroad et al.
Case No. 14CECG02314

Hearing Date: **June 8, 2016 (Dept. 502)**

Motion: Defendant Zim Industries' Motion for Summary Judgment/Adjudication

Tentative Ruling:

To deny. (Code Civ. Proc. § 437c.)

Defendant Orange Avenue Disposal Company's motion for summary judgment is off calendar in light of the dismissals filed by all plaintiffs.

Defendant Union Pacific Railroad Company's two summary judgment motions are continued to Thursday, July 7, 2016 at 3:30 p.m. in Dept. 502.

Defendant R.D. Green's motion for summary judgment is continued to Thursday, July 28, 2016 at 3:30 p.m. in Dept. 502.

For the continued motions, all filing deadlines will run from the original June 8, 2016 hearing date.

Explanation:

Defendant Zim Industries moves for summary judgment and summary adjudication of the four consolidated complaints asserting negligence and premises liability causes of action arising out of a vehicle vs. train collision.

All parties treat the causes of action for negligence and premises liability as substantively the same. Premises liability is a subspecies of negligence. (*Rowland v. Christian* (1968) 69 Cal.2d, 108, 108.) It is a theory of liability which attaches to those who own, possess or control real property. (*Isaacs v. Huntington Memorial Hospital* (1985) 38 Cal.3d 112, 134.) "A defendant cannot be held liable for the defective or dangerous condition of property which it [does] not own, possess or control. Where the absence of ownership, possession or control has been unequivocally established, summary judgment is proper." (*Donnell v. California Western School of Law* (1988) 200 Cal.App.3d 715, 720, citing *Isaacs, supra*, 38 Cal.3d at 134.)

Here, lack of ownership is undisputed. The central question is possession or control. As pointed out in the oppositions, Zim's own moving papers show that absence of possession or control has not been unequivocally established.

Zim itself raises a triable issue of fact as to its UMF 17, which asserts the conclusion that it did not own **or** control the property where the accident occurred. Zim points out that in December 2010 it hired Blackstone Asphalt to place a cap seal overlay on the existing asphalt to the east and west side of the crossing. (UMF 19.) Blackstone Asphalt also repainted the word "STOP" to the west of the crossing after the cap seal overlay was added to the existing asphalt. (UMF 20.)

A defendant exercises control where it takes affirmative action relating to the property in a manner that influences or affects the condition of the adjoining property. (*Donnell v. Cal. Western School of Law* (1988) 200 Cal.App.3d 715, 720.) In *Alcaraz v. Vece* (1997) 14 Cal.4th 1149, the California Supreme Court found sufficient affirmative action to raise a triable issue of fact as to whether a defendant exercised control where the defendant maintained the lawn and constructed a fence on property owned by the city, triggering a duty to protect persons from the hazard.

Here, Zim altered the railroad's property by hiring Blackstone Asphalt to repave the asphalt on either side of the crossing. Zim never contacted Union Pacific Railroad to obtain permission to do this work. It also altered the warning of "STOP AND LOOK" painted on the pavement, and replaced it with "STOP." There is evidence that the safety warning applied by Zim was inadequate – the word "STOP" was not painted in retroreflectivity, and no stop line or limit line was put in place. (Nighthenelser Dec. 8:1-15.) Additionally, there is evidence that Zim made the crossing more dangerous by raising the level of the road. (Smith AMF 39.) Accordingly, there is a triable issue of fact as to whether Zim's exercise of control over the property subjects it to liability for the dangerous condition of the crossing.

Pursuant to Cal. Rules of Court, Rule 3.1312(a) and Code Civ. Proc. § 1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: DSB **on** 6/6/16 .
(Judge's initials) (Date)

(23)

Tentative Ruling

Re: ***Robynne L. Whetton v. Bond Manufacturing, Inc.***
Superior Court No. 14CECG03197

Hearing Date: Wednesday, June 8, 2016 (**Dept. 502**)

Motion: Defendant/Cross-Defendant Sears Holdings Corporation's Motion for Summary Judgment or, in the Alternative, Summary Adjudication

Tentative Ruling:

To sustain all of Cross-Complainant Bond Manufacturing, Inc.'s evidentiary objections to Cross-Defendant Sears Holdings Corporation's motion for summary judgment.

To sustain all of Plaintiffs Robynne Lee Whetton's and Matthew Gustav Whetton's evidentiary objections to Defendant Sears Holdings Corporation's motion for summary judgment or, alternatively, for summary adjudication.

To deny Defendant/Cross-Defendant Sears Holdings Corporation's motion for summary judgment of Plaintiffs Robynne Lee Whetton's and Matthew Gustav Whetton's complaint, summary judgment of Cross-Complainant Bond Manufacturing, Inc.'s cross-complaint, or summary adjudication of each of Plaintiffs Robynne Lee Whetton's and Matthew Gustav Whetton's four causes of action. (Code Civ. Proc., § 437c.)

Explanation:

1. Cross-Complainant Bond Manufacturing, Inc.'s Evidentiary Objections

A. *Objections to Declaration of Jennifer R. Thomas*

Defendant/Cross-Complainant Bond Manufacturing, Inc. ("Bond") objects to paragraphs 7, 9, and 10 of the declaration of Defendant Sears Holdings Corporation's ("Sears") counsel, Jennifer R. Thomas, on the grounds that Ms. Thomas lack personal knowledge of the facts in the paragraphs, lacks foundation, and hearsay. (Objections Nos. 1-3.)

Since the paragraphs state that "at [her] direction [her] staff accessed" the Securities and Exchange Commission website and downloaded various documents, it is clear that Ms. Thomas did not download the documents herself and does not have personal knowledge about whether her staff actually accessed the websites that she says that they accessed and downloaded the specific documents that she says they downloaded. Hence, the Court sustains Bond's Objections Nos. 1-3.

B. *Objections to Declaration of Kathryn Guerra*

Objections Nos. 4, 9, & 12-14 – These objections are to paragraphs 4, 9, and 12 through 14 of the declaration of Kathryn Guerra. Bond objects to these paragraphs on the ground that Ms. Guerra lacks personal knowledge of the facts and assertions made in the paragraphs.

While Ms. Guerra's declaration states that she has personal knowledge of the facts set forth in her declaration, this is a conclusory statement that is not supported by any facts and is insufficient to establish that Ms. Guerra actually has personal knowledge of the facts. (*Snider v. Snider* (1962) 200 Cal.App.2d 741, Ms. Guerra states that she was, and currently is, the Director of Product Safety for Sears Holdings Management Corporation's Law Department and her duties include supervising other product safety office employees, analyzing risk pertaining to merchandise stocked by Sears entities, the recall process of products, and reporting to Sears Holdings Management Corporation's Law Department. (Guerra Decl., ¶¶ 2-3.)

However, nothing about her status as the Director of Product Safety for Sears Holdings Management Corporation or her listed duties establishes that she has personal knowledge of the ownership interests or operations of Sears Holdings Corporation (a different Sears company than the one she works for) or Orchard Supply Hardware Stores Corporation. There is also no evidence that she has personal knowledge about what products Sears Holdings Corporation may or may not have supplied to Plaintiffs.

Therefore, the Court sustains Bond's Objections Nos. 4, 9, and 12-14.

Objections Nos. 5-8, 10-11, & 15-17 – These objections are to paragraphs 5-8, 10-11, 15, and 17-18 of Ms. Guerra's declaration. All of these paragraphs are made “[u]pon information and belief[.]” Bond objects to these paragraphs on the ground that Ms. Guerra lacks personal knowledge of the facts and assertions made in the paragraphs.

“Declarations based on information and belief are insufficient to satisfy the burden of either the moving or opposing party on a motion for summary judgment or adjudication.” (*Lopez v. University Partners* (1997) 54 Cal.App.4th 1117, 1124.) Therefore, since information and belief means that the person does not have personal knowledge of the truth of the facts asserted, the Court sustains Bond's Objections Nos. 5-8, 10-11, and 15-17.

C. *Objections to Declaration of Catherine Layne*

Objections Nos. 18, 23, & 26-28 – These objections are to paragraphs 4, 9, and 12 through 14 of the declaration of Catherine Layne. Bond objects to these paragraphs on the ground that Ms. Layne lacks personal knowledge of the facts and assertions made in the paragraphs.

While Ms. Layne's declaration states that she has personal knowledge of the facts set forth in her declaration, this is a conclusory statement that is not supported by

any facts and is insufficient to establish that Ms. Layne actually has personal knowledge of the facts. (*Snider v. Snider* (1962) 200 Cal.App.2d 741, Ms. Layne states that she currently is the Manager of the Product Safety Office, and was the Senior Analyst of the Product Safety Office, for Sears Holdings Management Corporation's Law Department and her duties include analyzing risk pertaining to merchandise stocked by Sears entities, the recall process of products, and reporting to Kathryn Guerra and the Sears Holdings Management Corporation's Law Department. (Layne Decl., ¶¶ 2-3.)

However, nothing about her status as the Senior Analyst (then) or the Manager (now) of the Product Safety Office of Sears Holdings Management Corporation or her listed duties establishes that she has personal knowledge of the ownership interests or operations of Sears Holdings Corporation (a different Sears company than the one she works for) or Orchard Supply Hardware Stores Corporation. There is also no evidence that she has personal knowledge about what products Sears Holdings Corporation may or may not have supplied to Plaintiffs.

Therefore, the Court sustains Bond's Objections Nos. 18, 23, and 26-28.

Objections Nos. 19-22, 24-25, & 29-31 – These objections are to paragraphs 5-8, 10-11, 15, and 17-18 of Ms. Layne's declaration. All of these paragraphs are made “[u]pon information and belief[.]” Bond objects to these paragraphs on the ground that Ms. Layne lacks personal knowledge of the facts and assertions made in the paragraphs.

“Declarations based on information and belief are insufficient to satisfy the burden of either the moving or opposing party on a motion for summary judgment or adjudication.” (*Lopez v. University Partners* (1997) 54 Cal.App.4th 1117, 1124.) Therefore, since information and belief means that the person does not have personal knowledge of the truth of the facts asserted, the Court sustains Bond's Objections Nos. 19-22, 24-25, and 29-31.

D. *Objections to Sears Holdings Corporation's Evidence*

In Objections Nos. 32 and 33, Bond objects to Exhibit F and Exhibit H of Sears Holdings Corporation's index of exhibits and evidence on the grounds of hearsay, lack of foundation, relevancy, and failure to authenticate.

Since the Court has sustained the objections to the paragraphs of Ms. Thomas' declaration that purport to authenticate these two exhibits, the Court sustains Bond's Objections Nos. 32 and 33 on the ground of failure to authenticate.

2. Plaintiffs' Evidentiary Objections

A. *Objections to Sears Holdings Corporation's Evidence*

In Objections Nos. 1, 2, and 3, Plaintiffs Robynne and Matthew Whetton (“Plaintiffs”) object to Exhibit F, Exhibit H, and Exhibit I of Sears Holdings Corporation's

index of exhibits and evidence on the grounds of irrelevancy, not property authenticated, and no foundation.

Since the Court has sustained the objections to the paragraphs of Ms. Thomas' declaration that purport to authenticate these three exhibits (please see below for Objections Nos. 32, 33, and 34), the Court sustains Plaintiffs' Objections Nos. 1, 2, and 3 on the ground of failure to authenticate.

B. *Objections to the Declaration of Kathryn Guerra*

Objections Nos. 4, 9, & 12-14 – These objections are to paragraphs 4, 9, and 12 through 14 of the declaration of Kathryn Guerra. Plaintiffs object to these paragraphs on the ground that Ms. Guerra lacks personal knowledge of the facts and assertions made in the paragraphs.

While Ms. Guerra's declaration states that she has personal knowledge of the facts set forth in her declaration, this is a conclusory statement that is not supported by any facts and is insufficient to establish that Ms. Guerra actually has personal knowledge of the facts. (*Snider v. Snider* (1962) 200 Cal.App.2d 741, Ms. Guerra states that she was, and currently is, the Director of Product Safety for Sears Holdings Management Corporation's Law Department and her duties include supervising other product safety office employees, analyzing risk pertaining to merchandise stocked by Sears entities, the recall process of products, and reporting to Sears Holdings Management Corporation's Law Department. (Guerra Decl., ¶¶ 2-3.)

However, nothing about her status as the Director of Product Safety for Sears Holdings Management Corporation or her listed duties establishes that she has personal knowledge of the ownership interests or operations of Sears Holdings Corporation (a different Sears company than the one she works for) or Orchard Supply Hardware Stores Corporation. There is also no evidence that she has personal knowledge about what products Sears Holdings Corporation may or may not have supplied to Plaintiffs.

Therefore, the Court sustains Plaintiffs' Objections Nos. 4, 9, and 12-14.

Objections Nos. 5-8, 10-11, & 15-17 – These objections are to paragraphs 5-8, 10-11, 15, and 17-18 of Ms. Guerra's declaration. All of these paragraphs are made "[u]pon information and belief[.]" Plaintiffs object to these paragraphs on the ground that Ms. Guerra lacks personal knowledge of the facts and assertions made in the paragraphs.

"Declarations based on information and belief are insufficient to satisfy the burden of either the moving or opposing party on a motion for summary judgment or adjudication." (*Lopez v. University Partners* (1997) 54 Cal.App.4th 1117, 1124.) Therefore, since information and belief means that the person does not have personal knowledge of the truth of the facts asserted, the Court sustains Plaintiffs' Objections Nos. 5-8, 10-11, and 15-17.

C. *Objections to the Declaration of Catherine Layne*

Objections Nos. 18, 23, & 26-28 – These objections are to paragraphs 4, 9, and 12 through 14 of the declaration of Catherine Layne. Plaintiffs object to these paragraphs on the ground that Ms. Layne lacks personal knowledge of the facts and assertions made in the paragraphs.

While Ms. Layne's declaration states that she has personal knowledge of the facts set forth in her declaration, this is a conclusory statement that is not supported by any facts and is insufficient to establish that Ms. Layne actually has personal knowledge of the facts. (*Snider v. Snider* (1962) 200 Cal.App.2d 741, Ms. Layne states that she currently is the Manager of the Product Safety Office, and was the Senior Analyst of the Product Safety Office, for Sears Holdings Management Corporation's Law Department and her duties include analyzing risk pertaining to merchandise stocked by Sears entities, the recall process of products, and reporting to Kathryn Guerra and the Sears Holdings Management Corporation's Law Department. (Layne Decl., ¶¶ 2-3.)

However, nothing about her status as the Senior Analyst (then) or the Manager (now) of the Product Safety Office of Sears Holdings Management Corporation or her listed duties establishes that she has personal knowledge of the ownership interests or operations of Sears Holdings Corporation (a different Sears company than the one she works for) or Orchard Supply Hardware Stores Corporation. There is also no evidence that she has personal knowledge about what products Sears Holdings Corporation may or may not have supplied to Plaintiffs.

Therefore, the Court sustains Plaintiffs' Objections Nos. 18, 23, and 26-28.

Objections Nos. 19-22, 24-25, & 29-31 – These objections are to paragraphs 5-8, 10-11, 15, and 17-18 of Ms. Layne's declaration. All of these paragraphs are made "[u]pon information and belief[.]" Plaintiffs object to these paragraphs on the ground that Ms. Layne lacks personal knowledge of the facts and assertions made in the paragraphs.

"Declarations based on information and belief are insufficient to satisfy the burden of either the moving or opposing party on a motion for summary judgment or adjudication." (*Lopez v. University Partners* (1997) 54 Cal.App.4th 1117, 1124.) Therefore, since information and belief means that the person does not have personal knowledge of the truth of the facts asserted, the Court sustains Plaintiffs' Objections Nos. 19-22, 24-25, and 29-31.

D. *Objections to Declaration of Jennifer Thomas*

Plaintiffs object to paragraphs 7, 9, and 10 of the declaration of Defendant Sears Holdings Corporation's counsel, Jennifer R. Thomas, on the grounds that Ms. Thomas lack personal knowledge of the facts in the paragraphs, lacks foundation, and hearsay. (Objections Nos. 32-34.)

Since the paragraphs state that “at [her] direction [her] staff accessed” the Securities and Exchange Commission website and downloaded various documents, it is clear that Ms. Thomas did not download the documents herself and does not have personal knowledge about whether her staff actually accessed the websites that she says that they accessed and downloaded the specific documents that she says they downloaded. Hence, the Court sustains Bond's Objections Nos. 32-34.

3. Merits of Defendant/Cross-Defendant Sears Holdings Corporation's Motion for Summary Judgment or Summary Adjudication

Defendant/Cross-Defendant Sears Holdings Corporation (“Sears”) moves for summary judgment of Plaintiffs’ complaint and Bond’s cross-complaint. In the alternative, Sears moves for summary adjudication of each of the four causes of action alleged in Plaintiffs’ complaint.

In the instant motion, Sears contends that Plaintiffs cannot, as a matter of law, establish one or more of the elements of each of their four causes of action and that, if the Court grants Sears summary judgment on Plaintiffs’ complaint, Bond’s cross-complaint for indemnity and declaratory relief becomes moot. Sears’ undisputed material facts purport to establish that, on June 9, 2011, Plaintiffs purchased Bond Manufacturing, Inc. fuel gel and a ceramic fire pot from an Orchard Supply Hardware Stores Corporation store located at 147 West Shaw Avenue, Clovis, California 93612. On June 11, 2011, Plaintiffs returned to the store and purchased more fuel. (Sears’ Undisputed Material Fact (“SUMF”) No. 1.) On September 1, 2011, an initial recall announcement was issued by the Consumer Product Safety Commission for fuel gels, including the subject Bond Manufacturing, Inc. fuel gel. (SUMF No. 4.) Plaintiffs allege that they were both injured on April 25, 2013, when an explosion occurred while Plaintiff Matthew Whetton attempted to refuel the fire pot with fuel gel. (SUMF Nos. 17-18.) In the complaint filed on October 24, 2014, Plaintiffs allege that the fire pot and fuel gel had design defects and were unreasonably dangerous, that Defendants failed to adequately instruct or warn users of the dangers of using fuel gel, and that all defendants designed, tested, developed, engineered, manufactured, fabricated, assembled, modified, distributed, inspected, marketed, advertised, warranted, merchandised, recommended, promoted, placed into the stream of commerce, sold, and/or provided the subject fuel gel for use by members of the public, including Plaintiffs. (SUMF Nos. 19-23 & 28.)

From the date that the fuel gel and fire pot were purchased until December 31, 2011, Sears had an ownership interest in Orchard Supply Hardware Stores Corporation. (SUMF No. 5.) In 2011, Sears began the process of spinning off Orchard Supply Hardware Stores Corporation and, on December 31, 2011, the spin-off of Sears’ ownership interest in Orchard Supply Hardware Stores Corporation was executed and Sears and Orchard Supply Hardware Stores Corporation became legally distinct entities. (SUMF Nos. 6 & 15.) Sears and Orchard Supply Hardware Stores Corporation were operating independently of one another when Plaintiffs allegedly purchased the products and when the products were recalled, Sears did not have access to Orchard Supply Hardware Stores Corporation databases pertaining to customer lists or reward

member information when the products were purchased, and Sears did not supply or sell the product to Orchard Supply Hardware Stores Corporation or Plaintiffs. (SUMF Nos. 7 & 12.) At all times relevant to this lawsuit, Sears was never involved with Orchard Supply Hardware Stores Corporation's acquisition or sale of the fire pot and/or fuel gel, Orchard Supply Hardware Stores Corporation had an independent merchandising team which acquired merchandise without Sears' approval, and Orchard Supply Hardware Stores Corporation had an independent risk management team. (SUMF Nos.8-10.) When the fuel gel was recalled, Orchard Supply Hardware Stores Corporation assumed responsibility for the recall efforts independent of Sears and Bond Manufacturing, Inc. dealt with Orchard Supply Hardware Stores Corporation risk management members, not Sears, to coordinate the recall. (SUMF Nos. 11 & 13.) Finally, Sears has never designed, tested, developed, engineered, manufactured, fabricated, assembled, modified, distributed, inspected, marketed, advertised, warranted, merchandised, recommended, promoted, placed into the stream of commerce, sold, provided, or otherwise been involved with the products referenced in Plaintiffs' complaint. (SUMF No. 16.)

However, since the Court has sustained Plaintiffs' and Bond's objections to most of Sears' evidence, Sears' Undisputed Material Facts Nos. 5, 6, 7, 8, 9, 10, 11, 13, 15, and 16 are unsupported by any admissible evidence. Sears' remaining undisputed material facts do not prove that Plaintiffs and Bond cannot establish one or more elements of any of their causes of action as a matter of law. Therefore, Sears has failed to meet its initial burden of demonstrating that Plaintiffs and/or Bond cannot establish one or more elements of any of their causes of action as a matter of law.

Consequently, since Sears has failed to meet its initial burden, the burden does not shift to Plaintiffs and/or Bond to establish a triable issue of material fact. Accordingly, the Court denies Sears' motion for summary judgment of Plaintiffs' complaint and Bond's cross-complaint and Sears' motion for summary adjudication of each of Plaintiffs' four causes of action.

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: DSB **on** 6/6/16 .
(Judge's initials) (Date)

Tentative Rulings for Department 503

03

Tentative Ruling

Re: **Davis v. Chokatos**
Case No. 12 CE CG 02059

Hearing Date: June 8th, 2016 (Dept. 503)

Motion: Defendant Igbinosa's Motion for Protective Order

Tentative Ruling:

The hearing on the motion for protective order will be continued until June 22nd, 2016 at 3:30 p.m. in Department 503, to give plaintiff an opportunity to review the tentative ruling and appear via Court Call.

To grant defendant Igbinosa's motion for protective order relieving him from having to respond to the request for production of documents, set two, served on him on November 8th, 2015. (Code Civ. Proc. §§ 2017.20; 2031.060.)

Explanation:

Under Code of Civil Procedure section 2017.020, "The court shall limit the scope of discovery if it determines that the burden, expense, or intrusiveness of that discovery clearly outweighs the likelihood that the information sought will lead to the discovery of admissible evidence. The court may make this determination pursuant to a motion for protective order by a party or other affected person. This motion shall be accompanied by a meet and confer declaration under Section 2016.040." (Code Civ. Proc., § 2017.020, subd. (a).)

Also, under section 2031.060, "When an inspection, copying, testing, or sampling of documents, tangible things, places, or electronically stored information has been demanded, the party to whom the demand has been directed, and any other party or affected person, may promptly move for a protective order. This motion shall be accompanied by a meet and confer declaration under Section 2016.040." (Code Civ. Proc. § 2031.060, subd. (a).)

"The court, for good cause shown, may make any order that justice requires to protect any party or other person from unwarranted annoyance, embarrassment, or oppression, or undue burden and expense." (Code Civ. Proc., § 2031.060, subd. (b).)

Here, the burden, and intrusiveness of the document request clearly outweigh the likelihood that the information sought will lead to the discovery of admissible evidence. Plaintiff seeks production of all documents related to narcotics that the inmate population of Pleasant Valley State Prison (PVSP) received between 2005 and 2010. However, the only remaining cause of action in plaintiff's complaint does not

relate to the provision of narcotics to the inmate population of PVSP. Instead, it relates to the allegedly retaliatory cancellation of one of plaintiff's inmate appeals. It does not appear that documents relating to the provision of narcotics to all inmates at the prison would have any bearing whatsoever on plaintiff's remaining cause of action, or that the documents would be likely to lead to the discovery of admissible evidence regarding his claim. Plaintiff has not filed any opposition to the motion, so he has not provided any explanation of how the document request could ever lead to the discovery of admissible evidence.

Also, it appears that responding to the request would be burdensome and intrusive on the privacy rights of third parties. In order to respond to the request, Dr. Igbinosa would have to review five years' worth of prison medical records for every inmate at PVSP, which would clearly be very time-consuming and burdensome. In addition, the medical records of the other prisoners are subject to doctor-patient privilege and medical confidentiality. Forcing Dr. Igbinosa to release them would violate the medical privacy rights of the other inmates. Again, plaintiff has not filed opposition or provided any explanation of why he should be allowed to obtain the confidential medical treatment records of every other inmate in the prison for a five-year period, especially when his lawsuit does not relate to the provision of narcotics.

Therefore, the court intends to grant the protective order relieving Dr. Igbinosa of the obligation of responding to the document request.

Pursuant to CRC 3.1312 and CCP §1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: A.M. Simpson on 6/6/16 .
(Judge's initials) (Date)